

ELECTRONICALLY FILED

June 19, 2006

STUTMAN, TREISTER & GLATT, P.C.
 FRANK A. MEROLA
 (CA State Bar No. 136934)
 EVE H. KARASIK
 (CA State Bar No. 155356)
 CHRISTINE M. PAJAK
 (CA State Bar No. 217173), Members of
 1901 Avenue of the Stars, 12th Floor
 Los Angeles, California 90067
 Telephone: (310) 228-5600
 Facsimile: (310) 228-5788
 Email: fmerola@stutman.com
ekarasik@stutman.com
cpajak@stutman.com

SHEA & CARLYON, LTD.
 JAMES PATRICK SHEA
 (Nevada State Bar No. 000405)
 CANDACE C. CARLYON
 (Nevada State Bar No. 002666)
 SHLOMO S. SHERMAN
 (Nevada State Bar No. 009688)
 233 South Fourth Street, Second Floor
 Las Vegas, Nevada 89101
 Telephone: (702) 471-7432
 Facsimile: (702) 471-7435
 Email: jshea@sheacarlyon.com
ccarlyon@sheacarlyon.com
ssherman@sheacarlyon.com

Counsel for the Official Committee Of
 Equity Security Holders Of USA Capital First Trust Deed Fund, LLC

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:) BK-S-06-10725-LBR
 USA COMMERCIAL MORTGAGE COMPANY,) Chapter 11
 Debtor.)

In re:) BK-S-06-10726-LBR
 USA CAPITAL REALTY ADVISORS, LLC,) Chapter 11
 Debtor.)

In re:) BK-S-06-10727-LBR
 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,) Chapter 11
 Debtor.)

In re:) BK-S-06-10728-LBR
 USA CAPITAL FIRST TRUST DEED FUND, LLC,) Chapter 11
 Debtor.)

In re:) BK-S-06-10729-LBR
 USA SECURITIES, LLC,) Chapter 11
 Debtor.)

Affects

- ☒ All Debtors
☐ USA Commercial Mortgage Co.
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund LLC
☐ USA First Trust Deed Fund, LLC

Date: June 21, 2006
 Time: 9:30 a.m.

**LIMITED OPPOSITION TO DEBTORS' MOTION FOR ORDER APPROVING
 AGREEMENT WITH INVESTMENT PARTNERS (AFFECTS ALL DEBTORS)**

1 **TO THE HONORABLE LINDA B. RIEGLE, UNITED STATES BANKRUPTCY JUDGE:**

2 The Official Committee of Equity Security Holders of USA Capital First Trust
3 Deed Fund, LLC (the "First Trust Deed Committee") appointed in the above-captioned
4 bankruptcy cases (the "Chapter 11 Cases"), hereby submits its limited opposition (the
5 "Opposition") to the "Debtors' Motion for Order Approving Agreement with Investment
6 Partners" (the "Motion"), filed by USA Commercial Mortgage Company ("USACM"), on behalf
7 of itself and its affiliated debtors (each, a "Debtor" and, collectively, the "Debtors"), based on the
8 facts and argument set forth below:

9 **I. INTRODUCTION**

10 1. On June 9, 2006, the Debtors filed the Motion seeking Court authority to
11 approve the promissory note and related security agreement recently given by USA Investment
12 Partners, LLC ("Investment Partners") to document a \$58.3 million obligation owed by
13 Investment Partners and to provide collateral, including, among other things, all of Investment
14 Partners' interests in certain entities (the "LLCs"), for that obligation, as well as others owed by
15 Investment Partners. The First Trust Deed Committee has carefully reviewed the Motion, and
16 had engaged in preliminary discussions with the Debtors regarding these agreements.

17 2. Based on these discussions, the First Trust Deed Committee understands
18 that while the books and records of USACM show the obligations owed by Investment Partners,
19 the Debtors believe that these obligations may be actually owed to one or more of the Debtors.
20 However, in an effort to document this deal as quickly as possible to ensure maximum protection
21 to the Debtors' estates, the Debtors negotiated a promissory note between USACM and
22 Investment Partners but ensured that the security agreement would benefit all Debtors.

23 3. While the First Trust Deed Committee supports the Debtors in
24 documenting this transaction, the form of documents raise particular concerns. Moreover,
25 additional protections need to be put in place to ensure that payments made by Investment
26 Partners are equitably distributed among the various Debtor entities and there is no race to seize
27 control of the collateral pledged by Investment Partners. Finally, the First Trust Deed
28 Committee believes that, if Investment Partners or the Debtors' former insiders have the requisite

1 authority, additional security agreements with each of the LLCs are necessary to ensure that the
2 Debtors receive the benefit of their bargain as described further below.

3 II. ARGUMENT

4 A. Promissory Note.

5 4. Pursuant to its terms, the promissory note becomes due and fully payable
6 on May 31, 2007. This deadline, however, may be automatically extended to May 31, 2008 if
7 there is no event of default and USACM shall have received proceeds from the collateral
8 encumbered from the security agreement in an amount equal to \$20 million "in cash or
9 *promissory notes*". See Promissory Note, ¶2. The Debtors have advised that "promissory notes"
10 means cash equivalents. However, the note, itself, does not use the term "cash equivalent," and it
11 is non-sensical to pay down one promissory note with another. The maturity date of the
12 promissory note should only be extended if USACM receives cash of \$20 million or possibly
13 some specifically defined cash equivalent by May 31, 2007. Moreover, the payment of \$20
14 million should not be limited to the proceeds of the collateral encumbered by the security
15 agreement. Investment Partners should be required to pay the promissory note from all available
16 sources, whether or not pledged in the security agreement. Finally, any payments USACM
17 receives in connection with the promissory note should be held in trust for the benefit of all
18 Debtors.

19 B. Security Agreement.

20 5. The security agreement secures three different types of obligations. First,
21 it secures the obligations of the promissory note. Second, it secures certain obligations owed by
22 Investment Partners to USA Capital Diversified Trust Deed Fund, LLC, which are defined as the
23 "10-90 Loan". Finally, the security agreement secures "any and all other advances, loans,
24 obligations, liabilities, indemnifications and claims now or hereinafter owed" by Investment
25 Partners to any of the Debtors. See Security Agreement, §1.1.

26 6. Except for the description of the promissory note, the Debtors do not
27 describe any of the other obligations that are owed by Investment Partners to the other Debtors in
28 their Motion. It is the understanding of the First Trust Deed Committee that the 10-90 Loan is a

1 significant obligation of approximately \$58 million but it is unknown how large the other
2 obligations may be to the other Debtors. The Debtors should be required to provide additional
3 information regarding these other obligations.

4 7. Given the numerous obligations secured by the security agreement and the
5 extent of those obligations, the First Trust Deed Committee is particularly concerned about how
6 money received from Investment Partners will be applied against the various obligations and the
7 possible race to the "assets" by the various Debtor entities to foreclose on the collateral. In light
8 of these concerns, the First Trust Deed Committee requests that the Court order that all money
9 collected from Investment Partners, whether directly, from the proceeds of the collateral, or from
10 distributions made on account of Investment Partners' membership interests in the pledged
11 LLCs¹, be placed into a segregated account and not be applied to any of the obligations owed to
12 the Debtors absent a further Court order. Only with this protection can all Debtors be ensured
13 that they will receive their equitable share of payments made by Investment Partners.

14 8. Second, the First Trust Deed Committee also notes that, pursuant to the
15 security agreement, Investment Partners represents, warrants and covenants, that Investment
16 Partners is "the owner of or has other rights in or power to transfer the Collateral, free from any
17 right or claim or any personal or any adverse lien, security interests or other encumbrance except
18 for [among other things]. . . the provisions of the operating agreements of the LLCs." See
19 Security Agreement, §§ 7, 8. The Debtors, however, fail to explain how the operating
20 agreements of the pledged LLCs might affect the Debtors' interests in the collateral. Without
21 more information, it is difficult to determine the value, if any, the security agreement provides to
22 the Debtors. Again, the Debtors should be required to provide additional information.

23 9. Finally, the First Trust Deed Committee questions whether the collateral
24 secured by the security agreement provides adequate protection for the Debtors. The security
25 agreement only secures Investment Partners' interests in the pledged LLCs, not the property
26

27 ¹ Section 13 of the security agreement provides that the Debtors, subject to a limited carve-out,
28 shall receive all distributions payable on account of Investment Partners' membership
interests in the pledged LLCs.

1 belonging to the LLCs. To the extent that Investment Partners or any of the Debtors' insiders
 2 owns a majority interest in any of the LLCs, the Debtors should seek to obtain a direct security
 3 interest in any property belonging to any such LLC. Otherwise, the LLCs are free to dispose
 4 their property, take and distribute the profits according to their whims (e.g., pay supposed
 5 "salaries" to the Debtors' insiders), without any obligation to make corresponding distributions to
 6 parties who hold membership interests. Under such a scenario, the Debtors could potentially
 7 never receive distributions on account of Investment Partners' membership interests in the
 8 pledged LLCs nor realize the benefit of their security interests in the LLCs. The Debtors should
 9 be required to negotiate additional security agreements with each of the LLCs.

10 **WHEREFORE**, the Committee hereby opposes the Motion on the limited
 11 grounds set forth above.

12
 13 Respectfully submitted this 19th day of June, 2006.

14
 15 /s/ Eve H. Karasik

16 FRANK A. MEROLA (CA State Bar No. 136934),
 17 EVE H. KARASIK (CA State Bar No. 155356), and
 18 CHRISTINE M. PAJAK (CA State Bar No. 217173), Members of
 19 STUTMAN, TREISTER & GLATT, P.C.
 20 1901 Avenue of the Stars, 12th Floor
 Los Angeles, CA 90067
 Telephone: (310) 228-5600

21 and

22 CANDACE C. CARLYON
 23 Shea & Carlyon, Ltd.
 24 233 S. Fourth Street, Suite 200
 Las Vegas, NV 89101
 Telephone: (702) 471-7432
 25 COUNSEL FOR THE
 26 OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS
 OF USA CAPITAL FIRST TRUST DEED FUND, LLC